(3)

No. 06-160

Supreme Court, U.S.
FILED
OCT 19 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

Jason Davis, Kevin McClain, and George Brandt,
Petitioners,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

Richard L. Gaines
ELDRIDGE & GAINES PLLC
606 West Main St.
Knoxville, TN 37901-0084
Counsel for Petitioner McClain

Peter J. Strianse
TUNE, ENTREKIN & WHITE
AmSouth Center, Suite 1700
315 Deaderick St.
Nashville, TN 37238-1700
Counsel for Petitioner Brandt

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060
Counsel of Record and
Counsel for Petitioner Davis

R. Price Nimmo
NIMMO, HOEHN, & NIMMO
AmSouth Center, Suite 100
315 Deaderick St.
Nashville, TN 37238-0100
Counsel for Petitioner Davis

October 19, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

ADDITIONAL COUNSEL TO PETITIONER DAVIS

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONERS 1
CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona v. *Evans*, 514 U.S. 1 (1995) 4
Hudson v. *Michigan*, 126 S. Ct. 2159 (2006) 1
Illinois v. *Krull*, 480 U.S. 340 (1987) 4
Massachusetts v. *Sheppard*, 468 U.S. 981 (1984) 4
Murray v. *United States*, 487 U.S. 533 (1988) 4, 5
Nix v. *Williams*, 467 U.S. 431 (1984) 2
Pa. Bd. of Prob. & Parole v. *Scott*, 524 U.S. 357, 367 (1998) 1
Segura v. *United States*, 468 U.S. 796 (1984) 5
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1920) 2
United States v. *Bishop*, 264 F.3d 919 (CA9 2001) 6
United States v. *Ferguson*, 8 F.3d 385, 392 (CA6 1993) 8
United States v. *Leon*, 468 U.S. 897 (1984) ..... passim
United States v. *McGough*, 412 F.3d 1232 (CA11 2005) 6
United States v. *Meza*, No. 92-35461, 1993 U.S. App. LEXIS 10424 (CA9 May 5, 1993) 6
United States v. *Vasey*, 834 F.2d 782 (CA9 1987) 6
United States v. *Wanless*, 882 F.2d 1459 (CA9 1989) 6
Wong Sun v. *United States*, 371 U.S. 471 (1963) 2

STATE CASES

People v. *Cook*, 583 P.2d 130, 145 (Cal. 1978) 7, 8
People v. *Machupa*, 872 P.2d 114 (Cal. 1994) ..... passim
State v. *Carter*, 630 N.E.2d 355 (Ohio 1994) 8
State v. *Dewitt*, 910 P.2d 9 (Ariz. 1996) 9
State v. Johnson, 716 P.2d 1288 (Idaho 1986) 9

OTHER AUTHORITIES

Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 302 (1985) 9

John M. Maguire, *Evidence of Guilt* (1959) 2

REPLY BRIEF FOR THE PETITIONERS

1. In the wake of *Hudson* v. *Michigan*, 126 S. Ct. 2159 (2006), the government is seeking to dramatically narrow the exclusionary rule; it is pressing for that result here and in the lower courts. As this case makes clear, the government has ignored Justice Kennedy's statement in his controlling concurrence in *Hudson* that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." *Id.* at 2170. With the government adopting a contrary position, both in this case and elsewhere, a reaffirmation of this Court's precedents on the boundaries of the exclusionary rule is essential to protect the Fourth Amendment right to privacy. It is difficult to imagine a case that more starkly contrasts with this Court's settled decisions than the government's successful attempt here to constrict the boundaries of the exclusionary rule. This Court should make clear that, although the exclusionary rule is not to be extended beyond the bounds it has established, neither is it to be further narrowed.

The Solicitor General argues that the exclusionary rule does not apply to the fruits of a search pursuant to a warrant when the officer who secured the warrant was not involved in the initial illegal search. This view threatens the essence of the exclusionary rule in a situation where its deterrence benefits are substantial. This Court has recognized that when an officer is "searching for evidence of criminal conduct with an eye toward the introduction of the evidence at a criminal trial," as the officers who conducted the illegal search here were, it is precisely "[t]he likelihood that illegally obtained evidence will be excluded from trial [that] provides deterrence against Fourth Amendment violations." *Pa. Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 367 (1998). Because the government's position here makes illegally seized evi-

dence less likely to be excluded, it necessarily reduces the deterrent effect of the exclusionary rule.[1]

This conclusion clearly follows from this Court's "fruit of the poisonous tree" precedents. The fruit doctrine applies the exclusionary rule to evidence that "has been come at by exploitation of [a previous] illegality" rather than "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) (quoting John M. Maguire, *Evidence of Guilt* 221 (1959)). Here the taint remains because the evidence secured in the initial unconstitutional search was the basis for the request to research the same residence and to seize the drugs that support the indictment in this case. In such cases, this Court has expressly recognized that the "core rationale" of the exclusionary rule applies: suppression "is needed to deter the police from violations of constitutional and statutory protections." *Nix* v. *Williams*, 467 U.S. 431, 442-43 (1984). Indeed, the government's position to the contrary is essentially identical to that rejected by this Court in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391 (1920), namely, "that the protection of the Constitution covers the [initial illegal activity] but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act." The government reiterates that argument here, but this Court's precedents establish that this argument would dilute the deterrent effect of the exclusionary rule on the predicate illegal search.

The magnitude of this dilution is substantial, as is perfectly illustrated by the standard nature of the police-

---

[1] The harm to deterrence is especially acute under the facts of this case, in which the officers used illegally obtained evidence from the house to obtain a warrant to search *the same house*. Thus, the intent of the officers who conducted the warrantless search – namely, to obtain the evidence they saw to incriminate the defendants at a criminal trial – was fully realized when the search warrant was executed. This is the precise situation in which the exclusionary rule's deterrent effect is at its zenith.

investigatory practices employed in this case. When the officers here illegally searched the residence, they did not seize anything. They instead provided a report to another officer who had the job of investigating drug crimes and who secured a warrant based on what was seen in the first search. That process of transferring information happens hundreds of times every day, yet the inescapable essence of the Solicitor General's position is that this process dissipates the taint of illegally obtained evidence except for the most egregious Fourth Amendment violations. It is essential to the core values of the right to privacy under the Constitution that this Court grant certiorari and reaffirm its prior decisions rejecting the government's attempt to narrow the exclusionary rule.[2]

2. The government notably abandons in this Court its theory in the court of appeals that a magistrate ordinarily evaluates the constitutionality of the search underlying the warrant application, which, if correct, could have been the basis for a fair conclusion that the officer properly relied on the magistrate's ruling. As the petition explained – and as the Solicitor General does not dispute – in evaluating warrant applications, magistrates are in general not required to determine whether the evidence presented in a warrant application has been obtained legally. See Pet. 13-18; BIO 11 n.4. Thus, the application process becomes, under the government's theory, a mere laying on of hands. By permitting procedural regularity to take the place of substantive compliance with the dictates of the Fourth Amendment, the government's theory, if adopted, would effect a significant revision of the exclusionary rule and a concomitant reduction of the protection offered by the Fourth Amendment.

---

[2] Nor does the application of the exclusionary rule unduly inhibit investigations by later officers not involved in the initial illegality, who are free to secure from the magistrate a ruling on which they may properly rely on the legality of the antecedent search. *People* v. *Machupa*, 872 P.2d 114, 124 (Cal. 1994). It is thus simply not the case that "there was 'nothing more that [the second officer] could have or should have done * * * to be sure his search would be legal.'" BIO 9.

Because magistrates do not look back to the legality of predicate searches, there is simply no basis for applying the good-faith exception of *United States* v. *Leon*, 468 U.S. 897 (1984), here. *Leon* itself reiterates that there is no general exception for "good faith" by the police. 468 U.S. at 915 n.13; Pet. 11. Rather, as the petition explains at length, and as the government does not dispute, *Leon* and later cases applying a good-faith exception turn on officers' good-faith reliance on some non-police actor – whether it is a magistrate or a legislature – making a determination for which it, and not the police, is primarily responsible. See Pet. 11-12 (citing *Arizona* v. *Evans*, 514 U.S. 1 (1995); *Illinois* v. *Krull*, 480 U.S. 340 (1987); *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984); *Leon*, 468 U.S. 897). In those cases, unlike this one, exclusion of evidence would not deter misconduct by *the police*. Thus, the government's position in this case does not in any genuine respect follow from the "good-faith exception" to the exclusionary rule.

3. This Court has specifically settled that the fruits of a warrant that itself rests on an illegal search are not admissible. *Murray* v. *United States*, 487 U.S. 533, 540 (1988), concluded that the Fourth Amendment would require "suppression of all evidence on the premises" if an illegal search "affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." The "ultimate question," the *Murray* Court held, "is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Id.* at 542. Here, there is no dispute that the search pursuant to the warrant was not in any respect independent of the initial illegality, and suppression is required.

The government's only argument to the contrary is that *Murray* did not expressly consider application of *Leon*'s good-faith exception. BIO 12. That argument is meritless because the government's argument does not involve the good-faith exception either. As noted above, the government's position focuses entirely on deterrence, not on the le-

gal determination by a magistrate that was necessary to the holding of *Leon*. Both *Murray* and this Court's "fruit of the poisonous tree" cases squarely reject this deterrence argument and support the application of the exclusionary rule.

But the government's attempt to distinguish *Murray* also fails on its own terms. *Murray* relies directly on *Segura* v. *United States*, 468 U.S. 796 (1984), which was a companion case to *Leon*, and which held that an illegal search did not require suppression of evidence seized in a later search pursuant to a warrant only because there was no link between the initial illegality and the warrant application. See Pet. 8-9. When there is such a link, however, the logic of *Segura* requires that the resulting evidence be suppressed. There is no basis for the government's suggestion that this Court ignored *Leon* in deciding *Segura* and *Murray* or meant for *Leon* to provide an exception to the independent source doctrine.

4. Certiorari is further warranted to resolve the important circuit conflict squarely presented by this case. As the decision below recognizes, two circuits would have reached the opposite result on the facts here. Pet. App. 12a. Those circuits are joined by the high courts of several states. See Pet. 21. The Solicitor General contends that there is no clear split and that the Sixth Circuit overstated the degree to which it had parted ways with its sister circuits, but its attempt to distinguish the many conflicting decisions is unpersuasive.

The government's argument is that the courts cited by petitioners as adhering to the exclusionary rule in these circumstances have never considered a case that presented all three factors cited by the Sixth Circuit: (i) the initial Fourth Amendment violation was not egregious; (ii) the officer who violated the Fourth Amendment was different from the officer who sought and executed the warrant; and (iii) the circumstances of the initial search were fully disclosed to the magistrate. According to the government, the Sixth Circuit would have required suppression in the cases cited by petitioners. Whatever the merit of that claim, the relevant question in de-

termining whether a circuit conflict exists is instead whether other courts would have decided this case differently. The answer to that question is "yes" because those courts straightforwardly hold that the good-faith exception is not triggered when a warrant application rests on evidence gathered in an illegal search; the strongly worded and broad-cutting pronouncement in *United States* v. *Vasey*, 834 F.2d 782 (CA9 1987), is typical of the courts that would have decided this case differently: "[A] magistrate's consideration of the evidence does not sanitize the taint of the illegal warrantless search" because "warrant applications are requested and authorized under severe time constraints" and "without the benefit of an adversarial hearing." *Id.* at 790.[3] See, e.g., *United States* v. *McGough*, 412 F.3d 1232, 1239-40 (CA11 2005). Later Ninth Circuit precedent is similarly indistinguishable because each case reiterates *Vasey*'s absolute holding and gives no weight to the factors cited by respondent. See *United States* v. *Wanless*, 882 F.2d 1459, 1466 (1989); *United States* v. *Meza*, 1993 U.S. App. LEXIS 10424, at *4 & n.1 (May 5, 1993); see also *United States* v. *Bishop*, 264 F.3d 919, 922-24 (2001).[4]

---

[3] The government does not dispute that the Ninth Circuit's rule is that *Leon* does not apply if evidence underlying the warrant application was seized unconstitutionally. Although the government cites a footnote in *Vasey* stating that the "officer's warrant application misrepresented the circumstances of that search" (BIO 14), the Ninth Circuit noted that fact only to conclude that "[e]ven if" *Leon* applied, the evidence would still have to be suppressed. 834 F.2d at 790 n.4.

[4] The government implies that in *Bishop* the Ninth Circuit relied on the obviousness of the underlying illegality, quoting the court saying that "'there should be little doubt' that the antecedent warrantless stop of the defendant's vehicle 'was illegal and without probable cause.'" BIO at 14 (quoting *Bishop*, 264 F.3d at 924). Not only did the court not attribute any significance to that fact, the government omits that the more relevant illegal predicate search in that case was of a residence, not the vehicle. 264 F.3d at 922. The Ninth Circuit did not characterize the search of the house as egregious.

The courts following the *Vasey* rule attribute no weight to the fact that only one officer, rather than two, was involved; the identity of the officer is not mentioned as part of the calculus in any of the rulings. *People* v. *Machupa*, 872 P.2d 114, 123-24 (Cal. 1994), is illustrative. The detective who secured the warrant in *Machupa* was not involved in the initial illegal search, which was no more egregious than in this case. The Solicitor General claims that *Machupa* "rested in part on the court's determination that an internal inconsistency in the warrant affidavit would have hindered any effort by the magistrate to assess the legality of an antecedent warrantless entry." BIO 15. That is a mischaracterization that reverses the California Supreme Court's actual holding. The government omits that the court in *Machupa* unequivocally reaffirmed, with emphasis in original, its prior holding that in the ordinary cases "*it is not the magistrate's function also to determine whether the facts alleged in the affidavit were lawfully obtained.*" 872 P.2d at 124 (quoting *People* v. *Cook*, 583 P.2d 130, 145 (Cal. 1978)). The court reasoned that the "inconsistency" of the application in *Machupa* precluded "assess[ing] the legality of the antecedent warrantless entry" (BIO 15) only in the sense that the magistrate would have had no reason to treat the application as an unusual one in which she was asked to decide that question:

> It may be true that, as the government contends, magistrates have a duty even after *People* v. *Cook*, *supra*, 22 Cal.3d 67, to assess the legality of an antecedent warrantless search when such an assessment is, in the Attorney General's words, "clearly requested in the warrant application." That is a question we need not decide here because, despite the government's vigorous efforts to portray Detective Hansen's affidavit as a pointed and balanced request to the magistrate to adjudicate the constitutionality of the underlying entry, we do not find that the text of the affidavit itself or the circumstances surrounding

> its submission exhibit sufficient indici of reliability to support the government's position.

872 P.2d at 124. Because there is no argument in this case that officers asked the magistrate to evaluate the constitutionality of the illegal entry into the residence, the California Supreme Court would, under the rule in *Machupa*, reach the opposite result on these facts as it reached in that case.

State v. *Carter*, 630 N.E.2d 355 (Ohio 1994), similarly demonstrates that the government's claimed distinctions are irrelevant. In *Carter*, the officer who sought the warrant was not involved in the Fourth Amendment violation. The Solicitor General attempts to distinguish *Carter* on the ground that "the officer who had performed the initial warrantless seizure 'was unable to point to specific articulable facts that would lead a reasonable person to believe' that the seized individual had committed a crime." BIO 15. That is merely a statement of the standard governing whether there was a *Terry* violation; the Ohio Supreme Court held there was. There is no reason to believe that the Fourth Amendment violation in *Carter* was any less of a "close" question than in this case: the officers here admitted that the basis for their entry of the home was mere "speculation" and the court of appeals held that there was "no objective basis" for the entry, Pet. App. 9a-10a, citing its own earlier and unambiguous cases to the effect that probable cause requires "more than a mere suspicion," *id.* at 10a (quoting *United States* v. *Ferguson*, 8 F.3d 385, 392 (CA6 1993)). Moreover, the Ohio Supreme Court in *Carter* placed no weight on the "closeness" of the constitutionality of the predicate search, holding unambiguously that "[t]he good-faith exception does not apply where a search warrant is issued on the basis of evidence obtained as a result of an illegal search." 630 N.E.2d at 364. "[U]npurged illegality irreparably taints the search warrant when evidence is illegally obtained, and thus the specific deterrence rationale upheld by *Leon* dictates that suppression be granted." *Id.* at 363. Given this strongly worded rule, it is difficult to imagine that the Ohio Supreme Court would have come out differently under

the facts here. (The *Carter* ruling is particularly noteworthy because it gives rise to an intra-jurisdictional conflict between the Ohio Supreme Court and the Sixth Circuit.)

The government notes that in *State* v. *Dewitt*, 910 P.2d 9, 11 (Ariz. 1996), and *State* v. *Johnson*, 716 P.2d 1288, 1290-91 (Idaho 1986), "the warrants were obtained by the same agents who had conducted the earlier unlawful searches." BIO 15. However, neither of these courts relied upon the role of the warrant-executing officer in the initial search. To the contrary, the Idaho Supreme Court emphasized the role of "law enforcement" as a "group" rather than looking to the identities of the individual agents: "[T]he error was *not* committed by the judge * * * * [but by] law enforcement personnel – the precise group of government officials to whom the exclusionary rule has been directed." *Johnson*, 716 P.2d at 1301. In these cases "application of the exclusionary rule *will* serve a deterrent effect, which is *Leon*'s requirement." *Id.* The Arizona Supreme Court similarly held that "'[d]espite the police's good faith belief in its validity, the warrant is simply the fruit of a (warrantless) poisonous tree and the deterrent purpose of the exclusionary rule would be advanced by excluding [the evidence].'" *Dewitt*, 910 P.2d at 15 (quoting Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 Ind. L.J. 287, 302 (1985)) (alteration in original). The *Dewitt* court emphasized that the magistrate does not "'endorse past *activity*; *he only authorize[s] future activity*,'" *id.* (emphasis added by the court), and thus clearly thought the identity of the officers involved at each stage of the case is irrelevant.

5. Finally, there is no merit to the government's argument that certiorari should be denied because the underlying criminal case, although not the issue presented here, will be returned to the district court. The important federal question presented – which was the only basis in the district court advanced by petitioners for contesting the charges against them – has been finally decided. The district court ordered the case dismissed. The government advised that the court's order

was dispositive of the case, which would otherwise have to be dismissed. See Pet. 4. In reversing, the court of appeals completely resolved the issue. Further proceedings therefore will neither illuminate the question presented nor give rise to any other question that might merit this Court's review. The government notably is unable to articulate any actual benefit to returning the case to the district court, resorting instead to the mantra of "interlocutory." But every term, this Court grants certiorari in numerous cases that, like this one, are nominally "interlocutory" but are in fact in an appropriate posture for this Court's review.

Denying certiorari would also disserve the interests of this Court and the judiciary generally. The government hopes to cast this as a case in which petitioners are free to litigate the question through the federal courts a second time. Even on that assumption, there would be no reason to impose that burden on the district court and the Sixth Circuit. But the assumption is in any event false: it is overwhelmingly likely that this case will never return to this Court. Almost all criminal cases end in plea agreements; this case has been litigated to date because petitioners prevailed on their motion to suppress. The Court can be nearly certain that, following standard practice, the Assistant U.S. Attorney will agree to support a reduction in petitioners' sentence in exchange for a guilty plea that cuts off the right to appeal. Petitioners, with no way to be certain that this Court will eventually grant review, would be hard pressed not to accept such an offer. The denial of certiorari would simply deprive the Court of what is not disputed to be an ideal vehicle to decide the question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard L. Gaines
ELDRIDGE & GAINES PLLC
606 West Main St.
Knoxville, TN 37901-0084
Counsel for Petitioner McClain

Peter J. Strianse
TUNE, ENTREKIN & WHITE
AmSouth Center Ste. 1700
315 Deaderick St.
Nashville, TN 37238-1700
Counsel for Petitioner Brandt

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
Counsel for Petitioner Davis

Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER
& FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060
Counsel of Record and
Counsel for Petitioner Davis

R. Price Nimmo
NIMMO, HOEHN & NIMMO
AmSouth Center, Ste. 100
315 Deaderick St.
Nashville, TN 37238-0100
Counsel for Petitioner Davis

Amy Howe
Kevin K. Russell
Howe & Russell, P.C.
4607 Asbury Pl. NW
Washington, DC 20016
Counsel for Petitioner Davis

October 19, 2006